

ORAL ARGUMENT - 2/14/96
95-1165
WALKER V. HARRIS

LAWYER: May it please the court. This lawsuit arose out of the stabbing death of Mr. Ronald Harris. It occurred at a four plex in Brookshire, Texas, owned by the Walkers. The CA reversed the summary judgment granted by the TC, holding that there was a question of material fact as to the adequacy of the security provided by the Walkers at this four plex. It is our position that we do not even need to reach the question as to the adequacy of the security, because under the facts of this case there is absolutely no duty that was owed by the Walkers to a guest of their tenant who was high both on alcohol and cocaine at the time of this incident. And for that reason the summary judgment granted by the TC was proper.

SPECTOR: The guest was an invited guest?

LAWYER: I believe that the record reflects that he was not an invited guest of the tenant.

SPECTOR: So he was an uninvited guest and he was stabbed?

LAWYER: By another party-goer.

SPECTOR: Is that correct?

LAWYER: Yes.

ENOCH: You've said based on the facts of this case and I am having a hard time penning down the premises. I mean they've been described by one as being an apartment complex. They've been described as another as a duplex. And then a third has described it as actually a 4-family unit. Another ones described it as a compound. Keeping to the record what is the undisputed facts about what this is?

LAWYER: The Walkers own a four plex. Basically one building with 4 units, that is contained within an area with several other similar four plexes.

ENOCH: Now when you say an area, what do you mean by an area?

LAWYER: The record reflects that it is just in a residential area with several other of these buildings in Brookshire.

PHILLIPS: Do they own any common areas in these various buildings?

LAWYER: The record does not reflect as to who owns the common areas. The record reflects just that the Walkers own this one four plex within this other area.

OWEN: Do they own the other four plexes?

LAWYER: No, they do not.

OWEN: So they only own 1 four plex?

LAWYER: They own one building. That's correct.

ENOCH: And there is nothing in the record that describes what is meant by common areas or anything like that?

LAWYER: I don't believe there is anything in the record that indicates who owns the common areas.

BAKER: Are there common areas?

LAWYER: There are common areas in between the other buildings in this area.

CORNYN: Is there a homeowner's association? Are there bylaws for the maintenance and upkeep of the common areas?

LAWYER: There's nothing in the record to apply to that. It's our position that as this court knows negligence is composed of 4 elements: duty; breach of that duty; approximate cause; and damages. In this case there is no duty because the question of duty is based on several unrelated factors, the dominant factor being foreseeability. In this case under the undisputed facts of this case, the event that caused Mr. Harris's death was absolutely not foreseeable. The record reflects that there were no calls for any type of violent crimes to this area. The record reflects that this four plex in this area of other four plexes is not a sprawling complex in Houston or in Austin or in any big city with big city expectations of crime.

ENOCH: From the record how do we know that? How do we know that it's not a sprawling complex?

LAWYER: We know that it happened in Brookshire. And we know from the record that the Walker's owned one unit within just several other units. Several other four plex units.

ENOCH: How many is that?

LAWYER: I believe that there is some indication that there were 8 other buildings in this area.

ENOCH: But that's not sprawling?

LAWYER: Well it's not your typical apartment complex in your big city with your big city expectations of crime. The police chief indicated that this four plex is right on the end of a residential area. He described the crime in that area of Brookshire as moderate, and then light to moderate. Like I said there were no other violent crimes in that area. And I certainly would agree that there doesn't have to be another murder there to make the fact that there was a murder here foreseeable. But there needs to be something to give the Walkers some reason to believe that this type of crime would be foreseeable. And there is nothing to give the Walkers that knowledge or nothing to indicate that they should have known that.

ENOCH: Do you concede that as an owner of this property had the Walkers understood that the neighborhood in which they owned this property was a high crime area, do you concede they would have had a duty to provide security for that four plex?

LAWYER: Had the Walkers known that this was a high crime area, yes. But this is a different situation than a situation where you have a landlord and a tenant. In that situation the landlord has a higher degree of care that it owes to its tenants. Because in that situation it's an invitee. In this case we have at best Mr. Harris was a licensee. As you know social guests are treated as licensees. That's assuming that he's even invited to this party. I believe the record reflects that he was not an invited guest to this party. So he's actually treated as a trespasser, which is even lower. And given the status of the plaintiff in this

case, the duty owed by the Walkers to him is much lower than had he been a tenant or had he had some other special relationship that would give rise to a higher duty that the Walkers owed to him.

But in this case because anything even remotely close to what happened was not foreseeable there is no duty. There are other factors also that go into the question of whether there is a duty. One of them is whether the magnitude of putting this type of burden on the defendant, the respondent's expert has said that they should have had some kind of armed security guard or some kind of physical presence on the property. Well that's just simply not realistic for an owner of a four plex to have a security guard or a 24-hour guard on the premises.

HECHT: And yet you say if there had been more crime in the area that might be necessary?

LAWYER: If there had been more crime in the area certainly that might be necessary.

HECHT: Even though it's not practical to do it?

LAWYER: Well you probably wouldn't want to buy a four plex and rent it if it were in a high crime area if you had to provide that security.

HECHT: Or at least not have anybody come there.

LAWYER: Exactly. You have a situation where if you take it a step further if you are renting a house do you then have to hire a guard to protect against problems that guests may have in that situation. Basically it's our position that because there's no duty, there is no duty to provide security or no duty to

BAKER: What is the summary judgment evidence on control of the premises?

LAWYER: That issue was not addressed in the summary judgment.

SPECTOR: Where was the crime in relation to the building? Was it in the front yard?

LAWYER: Yes it was outside the premises.

SPECTOR: Outside what premises?

LAWYER: Outside the building.

SPECTOR: But an area that's owned by the...

LAWYER: That's not part of the record.

SPECTOR: It was just someone who had been inside the building?

GONZALEZ: Where was the party? Was the party inside or outside?

LAWYER: Essentially our argument is just that based on the fact that there is no duty there is therefore no duty to warn, no duty to provide security, and therefore, the summary judgment granted by the TC was proper.

OWEN: Where would you draw the line? You make the point that this is not a large

complex. Where would you draw the line as a legal matter?

LAWYER: Well I think that certainly a landlord owes a tenant a duty to protect them against crime necessarily locks, lights, and perhaps in a high crime neighborhood security guards. The line is drawn somewhere outside of that who are guest of tenants or licensees or trespassers. I think that certainly if you have specific knowledge that crime is a problem you may need to take some steps to alleviate that problem just like any duty that a landowner owes a licensee or a trespasser.

SPECTOR: Again the crime itself in the record there is no evidence that it was on the premises owned by the defendant?

LAWYER: It was outside of the four plex. I think the evidence shows that there was a stairway leading down from the specific apartment where this tenant who was having the party lived. And it happened from on the stairs and then sort of on the landing.

SPECTOR: On the stairs of the four plex?

LAWYER: That's correct, or right on the landing of the stairs

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RESPONDENT

LAWYER: Good morning Justices. I am Lawrence Rothenberg. I am pleased to be here on behalf of the Harris family. I would like to clear up a few fact points. I think that Justice Owen hit this case right on the head with her question: How do you draw the line? It's a fact question. And that's why summary judgment was inappropriate in this case. I don't think there is a dispute if you look at the record that the stabbing occurred...

GONZALEZ: Before we get to the fact question the court first has to answer the question: Is there a duty? And that's a matter of law. How would you articulate the factors as to why there is a duty in the first place?

ROTHENBERG: Your honor I do agree the duty...initially duty is a question of law. However, if the crime is foreseeable in an area, then duty arises. That is the Hott(?) case and the Nixon case that this court has written many years ago.

BAKER: Nixon had a per se statute involved in it...

ROTHENBERG: Yes Nixon did involve a statute, but that case...

BAKER: But we don't have that in this case is that correct?

ROTHENBERG: No there is no statute your honor but that same philosophy and that same theory was adopted in Hott v. Avoy(?) and also in another SC case Delaney v. U. of H., which adopted Nixon. Basically it says that even regardless of your stats(?), stats(?) isn't even important. Once the criminal act is foreseeable then a duty arises. Whether or not a criminal act is foreseeable is a fact question. So it's sort of like a geometry...

ABBOTT: _____ turn duty into a fact question.

ROTHENBERG: It is a fact question with all due respect your honor.

ABBOTT: Despite centuries of saying it's a legal question?

ROTHENBERG: Well what they say your honor is that duty is a question of law, but to determine duty. Duty is not just a one global _____ that applies to every cause of action. It's like saying I want to sue you for a tort. Well there are many torts, many different theories. Duty is a question for the court to determine. But in that determination if the court determines that there is criminal acts that are foreseeable, then the duty arises.

ABBOTT: Let me ask you about foreseeability. Other than expert testimony what evidence is there that this particular act was foreseeable?

ROTHENBERG: That's a good question. And I would point to the court two legal principles first before I answer you. And that is the particular act doesn't need to be foreseen. In other words you don't have to show that a prior murder like in Midkiff, the court said you don't even have to show a prior murder occurred, just some prior criminal conduct. In the Estopp v. Jack in the Box case, it was a spontaneous fight that occurred. So the question is not would this egregious conduct could have been anticipated, could a murder have been anticipated, that's not the question. The question is was there facts in this record that a reasonable person could know or look at and say there's crime here, the duty has arisen. And I say the answer is yes.

PHILLIPS: There's no difference in duty, but to a _____ manager and a little ole lady who rents out a room in the back?

ROTHENBERG: Yes there is your honor, and that's a fact question. I think the facts, the duty that you are going to impose upon somebody is based upon the facts.

PHILLIPS: You say the fact issue in duty comes in in foreseeable. What's the foreseeability element given the difference that arises in terms of a difference between the landlord?

ROTHENBERG: In this particular case there were reports of 4 crimes...

PHILLIPS: I'm not making myself clear. I just said a 1,000 unit apartment verses 1 room in the back; is there a difference in duty? You said yes. I asked how, and you start talking about the number of crimes in the area. What's the difference assuming there have been the same number of the same type of crimes in each area?

ROTHENBERG: You have to go through the Berry analysis where Berry says duty is a complex issue that involves several questions: the likelihood of the crime; the magnitude of preventing against the crime; foreseeability. Berry lists these issues. You have to do like an analysis sort of maybe as an evidentiary analysis in 403 where you are going to balance whether or not...

PHILLIPS: Who did that?

ROTHENBERG: The jury, the fact finder is going to have to decide what facts make the duty arise. If foreseeability is a fact question, and foreseeability is a component of duty, then duty must have a factual element.

PHILLIPS: There are other components of duty and one of them is the magnitude of the protection. And that's also for the jury? One question, separate questions?

ROTHENBERG: I think you can submit it globally. But I think that the jury considers all these factors

and says whether the duty arose under these facts.

OWEN: What's the specific question you asked the jury on duty?

ROTHENBERG: There was no jury, this was a summary judgment case.

OWEN: I know that. I am asking you. You're saying let the jury decide. What's the fact question that you asked the jury about to decide duty. What do you instruct them?

ROTHENBERG: You ask the jury whether the person was negligent. And in the definition of negligence you tell them that you are not negligent unless a duty arises, and a duty arises if so and so. And you list these things, these element that we've talked about that the court discussed in Berry.

OWEN: Which are what?

ROTHENBERG: The magnitude of the crime, the cost to the owner of preventing the crime, the predictability of the crime. There are several factors that the Berry court lists. But the first and foremost is the foreseeability of the risk: _____ of injury, weighed against the social utility of the conduct, magnitude of the burden. There are several factors that Berry goes through in analyzing whether there is going to be a duty. It's _____ to say that duty is merely a legal concept, because while that is true as a global statement in order to get to that analysis you've got to analyze foreseeability. And foreseeability is a factual analysis.

ENOCH: I realize you've pled this case as a negligence case, but in fact is this not a premises liability case?

ROTHENBERG: Well your honor I believe when I researched the case I felt the best causes of action based upon what happened in this case were negligence and failure to warn. However, there was no special exception to my pleadings. They probably could have made me do what you suggest.

ENOCH: If the attachment of the duty is as a result of Walker being a landlord isn't your root to getting to liability under the premises liability laws in this State?

ROTHENBERG: I think you are correct but I believe the premises liability laws are based upon negligence.

ENOCH: If in our opinion in Exxon v. Tidwell and also in our opinion Brownsville v. Isagari(?) that we begin with a premise that the landlord has no duty to the tenant for the conditions either naturally or artificial on the premises aren't we talking in terms of if there is going to be a duty it has to be an exception to the general rule that there is no duty. And as an example: generally a landlord has no duty to prevent criminal acts of a third party unless the criminals under their supervision are controlled, or unless landlord retains some sort of right of control over the premises. Don't we start out with certain general rules that govern whether or not there exist a duty?

ROTHENBERG: We start off with that general rule as you've said your honor. But you've omitted part of that rule. And part of that rule is unless it's foreseeable. And we've had many cases that say that. And I was asked the question why was this foreseeable? And my answer is that there was 4 criminal offenses that occurred in this tiny little project that the petitioners says is a small project. Four criminal offenses in the 6 month prior of thefts, criminal mischief which could have been misdemeanors or felonies it is unclear. But there were 4 crimes in this...

ENOCH: Isn't this duty really dependent on whether the defect is latent or obvious? I mean the duty of the landlord to warn or make safe really depends on whether or not it's something the tenant knows about or doesn't know about. Not on foreseeable.

ROTHENBERG: I believe you honor that in the summary judgment evidence that we presented and in the case law that's in our brief, the landlord does have a duty to once in a while to inspect the police records to see what the area is like. We have evidence from the police chief that this was a moderate area of crime. We had evidence of 4 crimes that occurred in this area. Now I think at some point the landlord can't just stick his head in the ground. He's got to say: I own the business, and part of my business is inviting people onto the people, renting out property; I want to check the area out to make sure I have some security.

PHILLIPS: So it's really a jury question if we have a four plex and you want to have a 24-hour security guard, whatever that costs - \$50,000 a year, that's really a jury question; a balance of whether that's something the law should impose upon a landlord, which I assume the landlord is going to pass that through to the rent, or attempt to, that's the best balance for society or not. That's really nothing a court ought to concern itself with or the legislature?

ROTHENBERG: I see where you're driving at your honor. But let me say that in this particular case there was some dispute over the facts. And I can read you what was in the record. The location of the incident in question is an apartment building, located within a complex of similar buildings at the intersection of Kinney and 4th in Brookshire, Texas. It goes on to say that the apartment building, although separately owned physically appears to be part of a complex of other buildings, the building appears to share common areas such as grounds and parking with other buildings in the premises.

PHILLIPS: That's on the police report?

ROTHENBERG: No, that's in the affidavit of Mr. Swanson, who went out and examined and described the property unobjected to at the summary judgment hearing. So we have a piece of property. That's not just 4 pieces of property sitting by themselves. It's a large area.

PHILLIPS: This has a larger question than whether this is _____ or 36. It is that balance in _____ our system of jury facts on an ad hoc case-by-case basis?

ROTHENBERG: Yes judge, but not to the extreme you've put it. I don't think that the jury is going to say: well a security guard...there was no security your honor. The record shows in a deposition testimony that I attached to my motion for summary judgment from the owner of the property, Mr. Walker, there was no security, there was no fence, there was no special lighting, there was no security guard, which maybe a jury would find or court could find that would be too much. But something, some effort to check the records, some effort to establish some type of security...

SPECTOR: I think the opposing briefs said that some of the police reports described calls to the apartments were domestic violence. Now what would be the landlord's responsibility to a tenant who is injured by a spouse? Are you saying they have some responsibility there?

ROTHENBERG: No ma'am, there was not one domestic violence call. I had the exhibit right in front of me, and that was attached to the summary judgment: criminal trespass; theft; criminal mischief; missing child; theft. Then there is some other things like loud music, accident. But there's nothing in it that specifically talks about domestic violence. I think that if the apartment manager is notified that someone's pet is missing, that doesn't arise a duty. But I think that...

SPECTOR: Well I guess my question is: this was an uninvited guest?

ROTHENBERG: Well I disagree with that. The evidence is that this person was attending a party, that's all the evidence. It does not say he was a party crasher.

SPECTOR: Was not a tenant?

ROTHENBERG: He was not a tenant. But the cases that I've cited in my brief your honor they do say that a landlord does owe some duty to the guest of the tenant because you can reasonably anticipate a tenant being on the property. And I would cite the court to the Parenboom v. H.S.P., 910 S.W.2d 156, which discusses that very issue your honor.

HECHT: If a jury finds that this was foreseeable is there any reason why there shouldn't be a duty _____? Can a court then decide there shouldn't be a duty?

ROTHENBERG: I don't believe so your honor.

HECHT: So foreseeability is really the test?

ROTHENBERG: I believe it is your honor. Under the cases, under Nixon and all the progeny of cases that have come out of the appellate courts, once there is a duty, then the question is did you discharge that duty? The jury may well find that there was no duty. Or the jury may well find that they discharged their duty, that what they did was enough.

GONZALEZ: How about the other prong of duty besides foreseeability? You're completely writing out cause and fact?

ROTHENBERG: With all due respect I think cause and fact is a prong of proximate cause, not a duty. Duty is strictly a question of foreseeability. And proximate cause contains the elements of foreseeability for cause and fact. But again you are getting into fact issues there.

ABBOTT: So duty exists because there were 4 prior incidents. What if there were 3, or 2, or 1?

ROTHENBERG: You're getting into the problems of the jury your honor.

ABBOTT: So what you're saying then is if we were to give this to a jury, once a jury decides foreseeability, the appellate courts can't review it? We will always have to give 100% deference to a jury?

ROTHENBERG: I think it's like if you have 2 witnesses to a car accident, and the TC believes one of the other. I mean at some point we have to give deference to the fact finders if there is any evidence to support the record.

ABBOTT: Let's assume there were no prior incidents out there, but a jury found that there was a duty, we would just go ahead and have to say well yes it's foreseeable...

ROTHENBERG: It would be a no evidence point. And I think it would be reversed with no evidence or insufficient evidence under Garza and those cases that have come out on insufficiency points.

PHILLIPS: Is there any element of negligent other than foreseeability, any element to the duty?

ROTHENBERG: I think yes. In order to be negligence you had to have breached that duty. In other words there has to be a duty. Once you have a duty, the next question is did you breach the duty? And that's the question.

PHILLIPS: What's the duty in this case?

ROTHENBERG: The duty to provide some security to the premises to deter. In the affidavit of our expert witness...

PHILLIPS: All owners of property have a duty to the world to deter crime on their property? I mean what duty are we talking about?

ROTHENBERG: I believe your honor that the affidavit of my expert, which this part was uncontroverted, said that apartments like these are targets for criminals because here is no fence.

PHILLIPS: Well I'm trying to get to the duty of the facts of this case. What's the duty here? Who owes who what duty to whom?

ROTHENBERG: I think that the landlord in this case owed a duty to its tenants and their guests to warn them of any...

PHILLIPS: And the uninvited guests?

ROTHENBERG: Your honor this was not an uninvited guest. I dispute that fact. Even if he is a trespasser you can't wilfully and wantly injure a trespasser.

PHILLIPS: I agree with that. I am just trying to see where this duty goes.

ROTHENBERG: Well I think the duty goes to the tenants. In this particular case, the evidence is that this person was attending a party there.

PHILLIPS: But beyond the tenant it just extends to the tenant?

ROTHENBERG: And their guest. That's what Pennenbrook(?) case that I've cited earlier talks about. And several of these premises liability cases that I cite in my brief talk about that.

PHILLIPS: The last one has a concomitant right I suppose...I mean to write into a lease: No parties without prior permission of the landlord...

ROTHENBERG: I believe the landlord could do that if he wanted to. But in this particular case judge, I think the issue is that the landlord here did nothing. Now it may be a jury would find that nothing was necessary under these facts, after a factual review of all the evidence. But my client hasn't even gotten her day in court. My client should be allowed to have a jury decide whether or not this was foreseeable. Have a jury decide whether or not the duty was discharged, whether they were negligent or not. Have a jury decide whether or not under proximate cause analysis that this was foreseeable. Foreseeability is part of both duty and proximate cause.

HECHT: Is there any difference between the two?

ROTHENBERG: I don't think there is any difference in the law as it applies to what the definition is. But we have since Professor Keeton and Professor Prosser have had their disagreements Texas Law has

put that into both duty and proximate cause.

GONZALEZ: Counsel assuming there is a duty, however amorphous that duty is _____, how do you get over the hump of no causation as a matter of law?

ROTHENBERG: Well I don't think that that's true. Because in order to like I said proximate cause is composed of certain elements. And the cases say that a crime is not a superseding intervening cause if the crime was foreseeable. Otherwise if you take that argument to the logical extreme you can just own an apartment project, put your head in the sand, take off all of the security gates, take the locks off the doors and say we don't care if people are getting killed, raped, or shot here, because it's a criminal act so therefore we are never going to be liable. So what we are doing is...

GONZALEZ: In the ideal world you are writing the rule. What type of security under these facts would you have us impose on an apartment complex such as this?

ROTHENBERG: A simple gate, an electronic gate to keep people in and out.

GONZALEZ: But in a party how would a gate help?

ROTHENBERG: Well the murder didn't though. The murder was a hardened criminal and the affidavit of Joe Garcia shows this person was a life criminal, would not have been on that property...

SPECTOR: I though he was a guest? Counsel said that they were both guests.

ROTHENBERG: I don't think that that's clear in the record. The only thing that's clear in the record is that Andre Lascer was a hardened life criminal that was there and stabbed my client, who was attending a party.

GONZALEZ: He crashed the party?

ROTHENBERG: I don't think it's clear in the record how he got there.

GONZALEZ: Did he know anybody there?

ROTHENBERG: That's not in the record.

OWEN: What evidence did you put on with causation, that he was there?

ROTHENBERG: Well the evidence that we had your honor was that our client was at the party. There was no evidence.

OWEN: What evidence did you put on about the murderer about how he got there and the causation?

ROTHENBERG: We don't know how he arrived. Nobody knew that fact. He was in prison and nobody knew how he got to the party. There was no witnesses.

OWEN: Was he at the party?

ROTHENBERG: Yes and there was no witnesses at the party that we were able to find that knew him.

GONZALEZ: How did you get the information that he was high on alcohol and cocaine?

ROTHENBERG: Well that's another thing. I believe that there was some evidence in the record of that, but I think it was hearsay and we objected to it. It was unauthenticated records. Here we've got a security expert making chemical and toxicology decisions. We objected to that. There was all kinds of problems with their summary judgment evidence. Which brings me to another point that I want to raise before my time expires, and that is your honors I believe that we are putting the cart before the horse in this case for this reason: because the summary judgment evidence in this case raised by the defendant in the TC was totally incompetent. There was no summary judgment evidence. The only evidence that passed any muster was the deposition testimony of Chief Garcia, which was contradicted. The rest of their evidence we objected to. It shouldn't have even been considered by the court. What they filed was basically a general demurrer like you would in federal court to our claim.

ENOCH: What case do you rely on as the best case supporting your view that under the facts of this case there is a duty?

ROTHENBERG: I would say the Hott v. Savoy case is probably the best and the Midkiff case. It's too tough to pick between those two. Because Midkiff was also a summary judgment reversal on a crime.

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REBUTTAL

LAWYER: May it please the court. Just to respond to a couple of points. First of all the status of the decedent in this case is extremely important. That determines the duty that is owed if any by the landowner. Certainly to a tenant the landowner owes a higher duty. To licensees and trespassers the duty is much lower.

BAKER: Does the record clearly show his status then?

LAWYER: Absolutely.

BAKER: An uninvited guest?

LAWYER: Well I believe that it shows clearly he is an uninvited guest. But even giving the respondents the benefit of the doubt and that he wasn't invited there, he is still a licensee. There is absolutely no question at all that he is not an invitee and he was not the tenant and under no theory is it alleged that he's an invitee. So the standard is lower, the duty that is owed by the landowner is much lower.

PHILLIPS: Is that the point you pled? On the summary judgment record we have it as the pleading _____ pleading for negligence _____.

LAWYER: That's correct. But under negligence in order to determine whether there was negligence you have to look at the factors given rise to negligence, and one of the factors is duty.

HECHT: Except for the status of the person injured there doesn't seem to be much difference between you and the respondent except that the evidence is not high enough in your view to establish foreseeability than it is in his view?

LAWYER: It's our position that duty is a question of law. Certainly if there are disputed facts...

HECHT: Like foreseeability?

LAWYER: The foreseeability question may become a question of fact.

HECHT: If this was foreseeable, if it is determined as a matter of fact by whoever should determine that, that this was foreseeable, is there any reason not to have a duty in these circumstances?

LAWYER: Absolutely. There is other factors that go into duty other than foreseeability. Certainly foreseeability is the dominant factor. But as I indicated before there are other factors that the court considers when determining if in fact there is a duty. For example, the magnitude of the burden that's placed on the defendant, the likelihood of the harm to the plaintiff verses the burden that's placed on the defendant. All of those factors also are considered when determining if in fact there is a duty.

PHILLIPS: Can that be articulated on this summary judgment record?

LAWYER: I believe under this summary judgment record, yes. I believe as a matter of law this incident was not foreseeable and therefore there is no duty.

PHILLIPS: If there had been 20 crimes in the last 6 months?

LAWYER: It depends on what the 20 crimes were for. If it were for very minor crimes possibly not. But with the record that we have before this court I think is a matter of law, it is not foreseeable. Certainly if there were other assaults that would give rise possibly to a duty because of foreseeability.

HECHT: I am still unclear. You say it would give rise to a duty because of foreseeability. But then you tell me there are other factors that have to be considered.

LAWYER: Right. And it may give rise to a duty based upon foreseeability. Like I said that is one of the factors to be considered. Foreseeability is the dominant factor. But like I said there are also other factors to be considered. We would ask that this court reverse the judgment of the CA and affirm the summary judgment granted by the TC.